

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW DOUGLAS PACE,

Defendant-Appellant.

UNPUBLISHED
September 23, 2014

No. 316644
Wayne Circuit Court
LC No. 11-004168-FC

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

In this appeal after remand for resentencing, offender Pace challenges his sentence of 17 to 180 months' imprisonment, with 554 days' jail credit, arising from his bench trial conviction of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b). Because the sentencing court did not state on the record the substantial and compelling reason for its departure from the sentencing guidelines, we must remand for another resentencing.

At the resentencing hearing, the parties confirmed that offender's total prior record variable (PRV) score was zero, and his total offense variable (OV) score was 20.¹ Applying those scores to the conviction placed offender in the A-II cell of the guideline grid for Class C offenses. MCL 777.64. The minimum sentence range for the A-II cell was zero to 17 months, which is an intermediate sanction. Under MCL 769.34(4)(a), if the upper recommended minimum sentence range is 18 months or less, the trial court is required to impose an intermediate sanction unless it states on the record a substantial and compelling reason to sentence defendant to prison. *People v Lucey*, 287 Mich App 267, 270; 787 NW2d 133 (2010).

"MCL 769.31(b) defines 'intermediate sanction' as 'probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed.' Thus, a prison sentence cannot constitute an intermediate sanction." *Lucey*, 287 Mich App at 271 (citations omitted). In *Lucey*, this Court reiterated:

¹ Both parties objected at resentencing to the scores for certain offense variables, but those objections are not at issue on appeal.

it is not enough that there *exists* some potentially substantial and compelling reason to depart from the guidelines range. Rather, this reason must be articulated by the trial court on the record. Accordingly, on review of the trial court's sentencing decision, the Court of Appeals cannot affirm a sentence on the basis that, even though the trial court did not articulate a substantial and compelling reason for departure, one exists in the judgment of the panel on appeal. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation. The obligation is on the trial court to articulate a substantial and compelling reason for any departure. [*Id.* at 274, quoting *People v Babcock*, 469 Mich 247, 666 NW2d 231 (2003).]

In this case, we found nothing in the resentencing transcript to explain the departure sentence. Accordingly, we remand for resentencing.

Defendant also contends that the trial court abused its discretion by merely crossing out incorrect information on the sentencing information report, and argues that the incorrect information must be completely stricken and a corrected report must be forwarded to the Department of Corrections. We disagree.

“The trial court’s response to a claim of inaccuracies in the presentence investigation report is reviewed for an abuse of discretion. A court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes.” *People v Waclawski*, 286 Mich App 634, 689; 780 NW2d 321 (2009) (citations omitted). “We review de novo the interpretation and application of statutes.” *Id.* at 645 (citation and quotation marks omitted).

This Court has stated that “[t]he Department of Corrections relies on the information contained in the [presentence investigation report (PSIR)] to make critical decisions regarding a defendant’s status.” *People v Lloyd*, 284 Mich App 703, 705-706; 774 NW2d 347 (2009). “Therefore, it is imperative that the PSIR accurately reflect the sentencing judge’s determination regarding the information contained in the report.” *Id.* at 706. “When a sentencing court disregards information challenged as inaccurate, the court effectively determines that the information is irrelevant and the defendant is entitled to have the information stricken from the report.” *Waclawski*, 286 Mich App at 690.

MCL 771.14(6) provides:

At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. The court may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections.

However, “[t]he failure to strike disregarded information can be harmless error.” *Waclawski*, 286 Mich App at 690.

In this case, the sentencing information report, which is appended to defendant's PSIR, contains hand-written corrections made by the judge at resentencing. Defendant suggests that merely crossing out information does not constitute striking. MCL 771.14 does not define "stricken." "Words not defined by statute are given their plain and ordinary meanings, and consulting a dictionary to ascertain those meanings is proper." *People v Brooks*, 304 Mich App 318, 320; 848 NW2d 161 (2014). *Random House Webster's College Dictionary* (2001) defines "strike," in part, as "to cancel; cross out." Accordingly, the trial court did not abuse its discretion in crossing out incorrect information. Defendant has not argued why merely correcting the sentencing information report was inappropriate in this case.

Even if the trial court erred by failing to completely strike the incorrect information, the error was harmless. See *Waclawski*, 286 Mich App at 690. The incorrect information was not used in calculating defendant's minimum sentence range, and the incorrect guidelines range was clearly crossed out. Defendant has not articulated how merely crossing out the incorrect information will affect him. As long as the corrected version was sent to the Department of Corrections, any error was harmless.

Remanded for resentencing to articulate on the record a substantial and compelling reason for the upward departure from the sentencing guidelines. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Kathleen Jansen

/s/ Peter D. O'Connell